

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL,)	CASE NO: 1:18-CV-00068
)	
Plaintiffs,)	CIVIL
)	
vs.)	Brownsville, Texas
)	
UNITED STATES OF AMERICA,)	Thursday, June 28, 2018
ET AL,)	
)	(2:02 p.m. to 2:23 p.m.)
Defendants.)	

TELEPHONE CONFERENCE

BEFORE THE HONORABLE ANDREW S. HANEN,
UNITED STATES DISTRICT JUDGE

APPEARANCES: (See page 2)

Clerk: Cristina Sustaeta

Court Recorder [ECRO]: Juanita Tabares

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Brownsville, Texas; Thursday, June 28, 2018; 2:02 p.m.

(Call to Order)

THE COURT: This is Judge Hanen. Who do I have on the line for the Plaintiffs?

MR. DISHER: Good afternoon, Your Honor. Todd Disher with the Texas Attorney General's Office.

THE COURT: And for the United States?

MR. GOLDSMITH: Your Honor, Aaron Goldsmith on behalf of the United States.

THE COURT: And for the DACA Recipient Intervenor?

MS. PERALES: Good afternoon, Your Honor. Nina Perales for the Perez Defendant Intervenor.

THE COURT: All right. And for the great State of New Jersey, who do we have?

MS. APTER: Rachel Wainer Apter.

THE COURT: All right. And we're on the record in 18-CV-68. I apologize. I hope the sound quality is working for everybody. We're doing this from like four different locations, so.

MR. DISHER: I can hear you just fine, Your Honor.

THE COURT: Good. We've got several things going on. But let's -- Mr. Disher, let me start with you and tell me, you know, what issue you have you think I need to address.

MR. DISHER: I don't know if we have a pending motion that necessarily needs to be addressed today, Your Honor. The

1 only thing that we have on file that we have asked for the
2 Court for relief is in regard to 30 declarations from other
3 court proceedings from sworn witnesses that have been included
4 on the individual DACA Recipient Intervenor's witness list --
5 excuse me, exhibit list, even though those witnesses were not
6 identified either on their witness list or their expert
7 disclosures.

8 We understand that the individual DACA Recipient
9 Intervenor's have filed a cross motion regarding one portion of
10 our exhibit.

11 **THE COURT:** They have. I have that in front of me.

12 **MR. DISHER:** Okay. So, yes, Your Honor, we have
13 asked the Court to exclude the portions or the exhibits on the
14 exhibit list from the individual DACA Recipient Intervenor's
15 from witnesses who are providing sworn testimony who were not
16 on the witness list for the expert disclosures. That is the
17 only thing that we have pending in front of the Court today.

18 **THE COURT:** All right.

19 **MS. PERALES:** (Indisc.). I'm sorry.

20 **THE COURT:** Go ahead. Go ahead, Ms. Perales.

21 **MS. PERALES:** This is Nina Perales. I think that
22 perhaps the most urgent pending matter relates to a pending
23 motion by Defendant Intervenor's, the DACA Recipients, for leave
24 of court to have federal witnesses who are former federal
25 employees or current federal employees testify in the case. We

1 have had depositions set. We have one set for tomorrow in
2 (indisc.). Today we had to postpone the deposition that was
3 set in Boston with Mr. (indisc.) because we do need leave of
4 course for these witnesses to testify.

5 **THE COURT:** All right. Mr. Goldsmith, your Motion
6 For Pro Hoc Vice is granted. Do you want to weigh in?

7 **MR. GOLDSMITH:** Yes, Your Honor. Our chief primary
8 concerns about the request for leave, one, with respect to
9 Mr. (indisc.), who is the former chief counsel of USCIS. Our
10 concerns are there's not good cause to allow his deposition
11 given that under a Fifth Circuit case law, the depositions of
12 the attorneys for parties is generally disfavored. We cited a
13 particular case when the (indisc.) addressed this. It also
14 states that he in the situations were (indisc.) depositions
15 even where the attorney-client privilege is not reciprocated.
16 There's still concerns with taking (indisc.) opinion of the
17 attorney, and we don't think it's appropriate. This is, I
18 think, the legal opinions are Mr. (indisc.) that he was the
19 chief counsel and provided legal representation and advice with
20 respect to (indisc.).

21 **THE COURT:** Okay.

22 **MS. PERALES:** Your Honor, if I might respond --

23 **THE COURT:** Go ahead.

24 **MS. PERALES:** -- for the Perez Defendant Intervenors.
25 We have had some folks testify who worked for the federal

1 government, and the United States has been there. We've been
2 able to avoid any problems at all with privileged or law
3 enforcement material. Mr. (indisc.) is not going to testify
4 regarding his opinion of the legality of DACA, but his
5 testimony is criminal to shed light on central factors in the
6 case which is the degree of discretion exercised by DHS
7 officers when they're receiving DACA applications.

8 **THE COURT:** How do we know that?

9 **MS. PERALES:** Well, because he was there when DACA
10 was put together and he's familiar with the guidelines and how
11 they are implemented. He is able to help us respond to some of
12 the reliability and credibility issues related to the
13 Plaintiffs' witness, Mr. (indisc.). And it's critically
14 important that we be able to respond to that through the
15 testimony of Mr. (indisc.) as well as others.

16 **MR. DISHER:** And, Your Honor, this is Todd Disher.
17 If I may briefly be heard, we join the Department of Justice in
18 their opposition to this for a lot of different grounds. We
19 know that the Court has ordered the Defendants to respond to a
20 pretty extensive set of interrogatories that really should get
21 down to the heart of the issue about the numerical
22 classification of DACA applications that get approved or denied
23 or rejected. And so we think that to the extent there is any
24 remaining questions of whether discretion was exercised under
25 DACA, which we don't think that there was and this argument is

1 pretty well-established in (indisc.) any remaining questions
2 that should be answered by the Defendant's response to the
3 interrogatories that, Your Honor, we'll begin to respond on the
4 last phone call we had.

5 **THE COURT:** All right. Here's what I'm going to do
6 on that. I'm going to deny the set of issues pending those
7 answers. And, Ms. Perales, when you see those answers, if
8 there's still a question, file a motion with the Court. It
9 doesn't have to be a long motion, but what it does have to say
10 is why can he help. And the only reason -- I mean I don't know
11 his job and I don't know what all he did and so -- but I don't
12 want his opinion of what he's been told, number one. And,
13 obviously, he can't reveal privileged attorney-client
14 information.

15 So setting all (indisc.) aside, does he really have
16 anything to offer? Now he may or may not, I don't know. But
17 why don't you wait and see the interrogatory answers -- because
18 I remember some of those subparts are pretty detailed -- and
19 then let's revisit this. But I'm denying it now without
20 prejudice to you bringing it back.

21 **MS. PERALES:** Thank you, Your Honor.

22 **THE COURT:** All right.

23 **MS. PERALES:** We do have a --

24 **THE COURT:** Who else -- there were at least people
25 there; weren't there? Or was he the only one?

1 Mr. Goldsmith, are you there?

2 **MR. GOLDSMITH:** Yes. Yes, Your Honor. There were
3 two other individuals and a 30(b)(6) witness. We really should
4 put the 30(b)(6) because we believe that if you look at the
5 categories they're seeking and they're very duplicative of
6 what's in either the interrogatories or the request for
7 production of documents.

8 **THE COURT:** All right. My ruling on that is the same
9 that I just made. Ms. Perales, you come back and tell me why
10 you need a 30(b)(6) motion -- or witness, I'm sorry --

11 **MS. PERALES:** Okay.

12 **THE COURT:** -- once you've seen the interrogatory
13 answers.

14 **MS. PERALES:** And I just want to clarify, we have the
15 request for two 30(b)(6) depositions. One is of the agency and
16 one is of the union that Mr. (indisc.) has already testified in
17 this case on behalf of. And it's unclear to me whether the
18 United States is opposing the 30(b)(6) deposition of the union
19 -- of a designated representation of the union in response to
20 issues specifically raised in Mr. (indisc.) declaration.

21 **THE COURT:** Mr. Goldsmith.

22 **MR. GOLDSMITH:** Yes, Aaron Goldsmith. First of all,
23 we don't represent the union, and we can't act and compel them
24 to appear on the deposition. I'd say that upfront. And then,
25 second, there's already been the deposition of the former

1 president, Mr. (indisc.), and we're not sure what added value
2 there is of having a 30(b)(6) deposition of the union that
3 would require a federal employee to appear.

4 **THE COURT:** Okay. Well, I'm not ruling on this one
5 at all until we, you know -- because no one has really properly
6 been served it sounds like to me.

7 **MS. PERALES:** Well, Your Honor, we're happy to serve
8 a third-party subpoena on the union, but we will require leave
9 of court for that person to testify unless we have an agreement
10 from everybody that the person is testifying as, you know, with
11 the agreement. We just want to make sure we don't run afoul of
12 any of their prohibitions on the testimony of federal
13 employees. That's (indisc.), Your Honor.

14 **THE COURT:** Okay. Well, I'm giving you leave to
15 subpoena.

16 **MS. PERALES:** Okay. Thank you.

17 **THE COURT:** And then we'd come back if there's an
18 issue on it. I mean there may not be anybody that knows more
19 from the union than the person you've already deposed.

20 **MR. DISHER:** Your Honor, this is Todd Disher, if I
21 can briefly add a couple of things here. First of all, our
22 witness, Mr. (indisc.), while he was the president of the
23 national Union at the time of the (indisc.), he testified based
24 on his experiences and what he heard and learned from these
25 different union members. So he didn't necessarily testify in

1 his capacity as former union president. It was really his
2 capacity as a fact witness based on the information that he may
3 have learned while he was union president.

4 And then the second thing to raise as well is, of
5 course, tomorrow is the end of discovery, so any deposition or
6 any subpoena that gets issued now would have to fall outside of
7 the discovery period (indisc.).

8 **THE COURT:** Well, let me -- that brings me to
9 Ms. Apter's motion.

10 **MS. APTER:** That's correct, Your Honor.

11 **THE COURT:** Ms. Apter, I have a motion from you to
12 extend things?

13 **MS. APTER:** Correct, Your Honor. We filed a motion
14 requesting a very brief extension in this case because in the
15 DC district court, the former July 23rd deadline when the stay
16 was going to expire, but the date has now been indefinitely
17 extended and there will be additional briefing in the DC
18 district court that goes at least until July 27th.

19 And, as you have heard, there are a series of issues
20 that are not yet resolved in this case. And so we requested a
21 very short additional 14 days of the briefing schedule and, in
22 theory, for any discovery that still needs to be completed. It
23 would then be completed in that time.

24 **THE COURT:** Okay.

25 **MS. APTER:** Not to reopen, I'm sorry. We were not

1 seeking to reopen any discovery that has already closed, so.

2 **THE COURT:** Right. Does anybody have an objection to
3 that?

4 **MR. DISHER:** Your Honor, this is Todd Disher. We do
5 have an objection to that. The parties have been working very
6 diligently and cooperating together to get the necessary
7 discovery done in the court-ordered 30-day window that we've
8 had to do so. And we have been able to depose every single
9 witness who is listed on any party's witness list as well as
10 each individual expert that has been designated subject to the
11 two expert -- federal expert witnesses designated by the
12 individual DACA Recipient Intervenors.

13 So we do not think that any additional time is
14 necessary. We think that the parties have been working well
15 together and have accomplished their goal. And then the only
16 remaining discovery issues out there are the Defendant's
17 respond to the interrogatories which are due, I believe, next
18 Thursday well in advance of the final deadline to do any
19 additional briefing and well in advance of the hearing date.

20 And then if there's any lingering depositions that
21 need to happen of the federal employees, we are confident that
22 the parties can work together to make those happen before the
23 final round of briefing as well. So we do not know why we need
24 an additional 14 days to brief legal issues that the parties
25 will have had over two months to brief. So we do oppose any

1 additional extension to the briefing schedule or the hearing
2 date because we do think that all parties have had a fair
3 opportunity to seek discovery and all parties should be ready
4 to brief these largely legal issues to Your Honor and have a
5 hearing on July 17th, the current scheduled date.

6 **THE COURT:** All right. Here's what I'm going to do.
7 I'm going to grant Ms. Apter's motion in large part because I
8 just told Ms. Perales she has to wait to see the interrogatory
9 answers. And so I don't think it's fair to her to have me say
10 she's got to wait and then tell her, oh, by the way, if you can
11 wait, it's too late to do anything about it. So I'm granting
12 the motion. I'm adopting the dates she has in the motion,
13 which would be a discovery cutoff of July 13th, post-discovery
14 briefing July 21st, and responses by July 27th. And I'm moving
15 the hearing to August 8th.

16 **MR. GOLDSMITH:** I'm sorry, Your Honor. What's on
17 July 21st? I'm sorry.

18 **THE COURT:** It's post-discovery briefing.

19 **MR. GOLDSMITH:** Okay.

20 **THE COURT:** Okay. Now, you know what, you can't get
21 anything without something being -- a burden being placed on
22 you. So I'm adding to your list of things that the Court's
23 interested in. Number one, I want to know the effect of
24 Secretary Nielson's June 22nd memo because, obviously, what
25 raises the (indisc.) is does it moot this case. And then I

1 want to know the impact, if any, on Trump vs. Hawaii. So in
2 your briefing notes, keep in mind that I'm interested in those
3 two things.

4 **MR. GOLDSMITH:** Understood, Your Honor. In addition
5 to all the other ones that I've given you earlier.

6 **THE COURT:** All right.

7 **MS. PERALES:** Your Honor?

8 **THE COURT:** I'm sorry that I did not -- go ahead,
9 Ms. Perales.

10 **MS. PERALES:** This is Nina Perales. Before you send
11 us away, the United States didn't mention that we would also
12 move for leave to allow the testimony of Mr. (indisc.). He was
13 set for deposition today, but we postponed him (indisc.) to
14 July 3rd. We'd like to be able to move forward with his
15 deposition and be able to depose his declaration testimony.

16 **THE COURT:** Any objection to that?

17 **MR. GOLDSMITH:** Yes, Your Honor. Although we don't
18 have the same objection that we have with respect to
19 Mr. (indisc.) because he is not an attorney, we still don't
20 think it's appropriate because it's simply if there's no good
21 cause for allowing testimony as to background and the purpose
22 behind his background. To the extent he would testify as to
23 internal deliberations, we think that would be (indisc.). So
24 there really is no reason to allow his deposition in this
25 matter.

1 **THE COURT:** Ms. Perales, what is he going to testify
2 to that's in contest here?

3 **MS. PERALES:** Well, he's going to testify about the
4 exercise in (indisc.) control of discretion which is at the
5 center of the case and how the different pieces of DHS exercise
6 that control of discretion (indisc.).

7 **THE COURT:** Okay. So you think he knows -- and,
8 again, it may be relevant. I don't know. But to the extent he
9 does, then I'm going to allow his deposition to go forward.

10 **MS. PERALES:** Thank you, Your Honor.

11 **MR. DISHER:** And then, Your Honor, this is Todd
12 Disher with Texas. The last piece before we get off the line
13 here is tomorrow is the scheduled deposition for Sarah Salvonya
14 (phonetic). She was the director of ICE from about 2014 until
15 2017. She was -- her testimony and deposition were originally
16 opposed by the Department of Justice, but we have set her
17 deposition for tomorrow. So I just want to give you clarity
18 that that is allowed to go forward pursuant to the Court's
19 instruction.

20 **THE COURT:** Mr. Goldsmith.

21 **MR. GOLDSMITH:** Well, we would oppose for similar
22 reasons. We understand for good cause (indisc.) allowing
23 discovery under 26(d)1), but that discovery should be limited,
24 should be narrowly tailored. Again, to the extent there's
25 testimony as to why DACA was created in the first place, that

1 doesn't -- that is not narrowly tailored to the issues in the
2 preliminary injunction. And we think that's well outside the
3 scope of the limited discovery that should be ordered by the
4 Court in the context of the expedited discovery.

5 **THE COURT:** Mr. Disher, what --

6 **MS. PERALES:** And Your Honor?

7 **THE COURT:** -- well, whoever's --

8 **MS. PERALES:** We are also inclined, Your Honor, this
9 is Nina Perales. (Indisc.). We, as I mentioned before, have
10 done an excellent job of avoiding any issues of privilege.
11 Obviously, the question (indisc.) probably might narrow your
12 question with respect to Perez who did defend in her deposition
13 that we think that we can avoid any probable disclosure that
14 DOJ might be worried about.

15 **THE COURT:** All right. I'm going to allow this
16 deposition to go forward, too. But the last two we talked
17 about, you know -- let me -- I've said this before, but let me
18 say it again. I don't think there's any issue of the reasons
19 or any purpose of the reasons of why DACA was created. I mean
20 I think, quite frankly, y'all could agree and stipulate to that
21 and we wouldn't need any testimony. I mean because it's not
22 really a controlling issue unless you guys convince me
23 otherwise as to why it was created.

24 Now the discretion part, I'm going to allow
25 Ms. Perales to ask -- to, you know, inquire into. But, again,

1 you know, we've got to go on, you know, personal knowledge here
2 and the things that we have any personal knowledge of this.

3 So I'll leave it at that --

4 **MS. PERALES:** Thank you, Your Honor.

5 **THE COURT:** -- that I'm going to allow the deposition
6 to go forward.

7 **MR. GOLDSMITH:** Understood, Your Honor. And then the
8 very last thing, Mr. (indisc.) has been designated as an expert
9 by the Defendant Intervenors. And so I just want to be sure
10 that we receive, of course, the required expert material before
11 his deposition goes forward on July 3rd.

12 **MS. PERALES:** We can get that today. We'll get that
13 out today.

14 **THE COURT:** Okay. Good. Excellent. All right. I
15 appreciate y'all working together on this. I'll try to be
16 available. I just wasn't available yesterday. I apologize
17 about that. But, you know, we'll get this resolved. And to
18 the extent that --

19 **MS. PERALES:** Thank you, Your Honor.

20 **THE COURT:** -- to the extent y'all can reserve it
21 without me, I'm just giving you a commercial (indisc.).

22 **MR. GOLDSMITH:** Understood, Your Honor.

23 **MS. PERALES:** Thank you.

24 **THE COURT:** All right. Thank you, ya'll.

25 **MR. GOLDSMITH:** Thank you.

1 **MS. PERALES:** Thank you.

2 **THE COURT:** Bye.

3 **MS. PERALES:** Bye bye.

4 **(Proceedings adjourned at 2:23 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in black ink, appearing to read "Toni Hudson", is written above a horizontal line.

Signed

June 29, 2018

Dated

TONI HUDSON, TRANSCRIBER